STARE DECISIS AND CONTRACTUAL RIGHTS.

IN Muhlker *v.* New York & Harlem R. R. Co.[1] the Supreme Court of the United States held that the raising, pursuant to a state statute so directing, of a railroad structure in Park Avenue, New York City, which formerly was on, or partially below, the level of the street, to an elevated viaduct, whereby the easements of light and air of abutting owners were substantially curtailed, deprived owners who had purchased since the decisions of the New York Court of Appeals in the elevated railroad cases[2] of contractual rights in contravention of the Constitution of the United States.

The decisions in the New York elevated railroad cases are so generally familiar that it will not be necessary to do more than briefly state their substance. In Story *v.* New York Elevated R. R. Co.[3] it was held that the erection and operation of an elevated railroad structure in a public street did not involve a legitimate street use, but constituted an actionable invasion of easements of light, air, and access of abutting owners. In Lahr *v.* Metropolitan Elevated R. R. Co.[4] the doctrine of the Story case was reiterated, the decision being particularly significant because two of the judges who had dissented in the Story case concurred on the ground of *stare decisis*. When the question of the Park Avenue viaduct came before the Court of Appeals in Lewis *v.* New York & Harlem R. R. Co.,[5] it was taken for granted that the building of a structure higher above the street level than a previous structure which had been used by the railroad wrought an additional invasion of easements of light and air, and that the principles of the Story and Lahr cases must control, entitled abutting owners to damages.

In the Muhlker case,[6] however, the court took just the contrary view, attempting a distinction on the ground that the railroad viaduct amounted merely to a change of grade of the street, which

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[1] 197 U. S. 544.

[2] Story *v.* New York Elevated R. R. Co., 90 N. Y. 122; Lahr *v.* Metropolitan Elevated R. R. Co., 104 N. Y. 268.

[3] *Supra.*

[4] *Supra.*

[5] 162 N. Y. 202.

[6] 173 N. Y. 549.

might be made without compensation to private landholders. This distinction was based upon the earlier New York case of Radcliffe's Executors *v.* Brooklyn,[1] and it may be remarked, in passing, that in his dissenting opinion in Fries *v.* New York & Harlem R. R. Co.[2] Judge Cullen not only showed that the doctrine of Radcliffe's Executors *v.* Brooklyn had been repudiated in many jurisdictions and that the hardship of its application had been salved in several instances in New York by legislative enactments, but also demonstrated that the effort to justify the Park Avenue viaduct involved an unwarrantable extension even of that very extreme case.

The Muhlker case, while thus presenting to the Supreme Court of the United States about as meritorious a situation as could be imagined, did not afford the first recognition by that tribunal of contractual or vested rights in the observance of the doctrine *stare decisis*. It does, however, extend such recognition into a new field.

In Gelpcke *v.* Dubuque[3] it was held that decisions of the Supreme Court of Iowa, interpreting the constitution and statutes of that state, afforded legal rules to govern transactions which occurred before such decisions were overruled by a later decision of the state Supreme Court. From the decision in the Gelpcke case Justice Samuel F. Miller dissented, characterizing it as a step "in the direction of a usurpation of the right, which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes." The opinion of the court dwelt principally upon the obvious injustice of permitting judicial "oscillations" to disturb contractual relations entered into upon the faith of deliberate decisions.

The Gelpcke case is harmonious in principle with Harris *v.* Jex in the New York Court of Appeals,[4] in which it appeared that a grantee of premises subject to certain mortgages executed prior to the Legal Tender Act, after the decision of the Supreme Court of the United States,[5] holding said act void as to antecedent contracts, and before the reversal of that decision,[6] tendered payment of the mortgages in legal tender notes, which was refused. In an action to foreclose the mortgages it was held that the mortgagee was entitled to repose upon the decision of the highest judicial

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[1] 4 N. Y. 195.
[2] 169 N. Y. 285.
[3] 1 Wall. (U. S.) 175.
[4] 55 N. Y 421.
[5] Hepburn *v.* Griswold, 8 Wall. (U. S.) 603.
[6] Knox *v.* Lee, 12 Wall. (U. S.) 457.

tribunal in the land, which was, as applied to the relations between the parties, *the law* and not mere evidence of it; and that the tender, being insufficient according to the law as then declared, did not discharge the lien of the mortgages.

The purport of the decisions in the Gelpcke case and in Harris *v.* Jex is that, in dealing with a question that in a sense is one of foreign law, that is, the construction of an enactment of an outside legislative body by its own highest judicial interpreter, a construction that has been given will be treated as a reliable basis for business dealings until the same court renders a different one. The Gelpcke case originated in a federal court, and the principle it laid down did not go further than protection of contractual rights of persons entitled to resort to federal courts in the first instance.

It is of interest to note that in the Muhlker case the law which was held to be the contractual basis — that is to say, the law of the elevated railroad cases — was pronounced by courts and not by statute. The decision would therefore seem to be an authoritative repudiation of the Blackstonian theory[1] that a decision is only a more or less successful attempt to discover and state what the law is. The Supreme Court countenanced the doctrine of Austin[2] by holding that a decision of a court is the law itself, and therefore, it is argued, a continuing rule of conduct upon whose applicability trust may be placed until fair notice is given that not it, but another rule, shall prevail in the future.[3] The Story and Lahr de-

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[1] 1 Bl. Com. *70.

[2] Austin, Jurisp., § 778.

[3] The most satisfactory exposition of the process of common law evolution with which the writer is familiar is the following by Sir Henry Maine: "We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact, they have changed. A clear addition has been

cisions by the New York Court of Appeals of purely common law questions were treated as *the law*, in the same manner that in Harris *v.* Jex the New York Court of Appeals accepted the earlier construction of the Legal Tender Act as *the law*.

The Muhlker case did not originate in a federal court, and its decision by the Supreme Court of the United States goes further than any previous authority, because it is held that an attempted change in *the law* by a state court in a suit between its own citizens raises a question under the Constitution of the United States, which may be taken advantage of on appeal from the highest court of the state. The actual decision in the Muhlker case, in like manner with that in the Gelpcke case, is a substantial aid to stability of contractual obligations and to justice. It would be exceedingly difficult, however, to answer the theoretical argument of Justice Holmes, with whom three of his associates concur in dissent. The gist of his reasoning is that the federal court is bound by local decisions as to local rights in real estate, and equally bound by the distinctions and limitations of those rights declared by the local courts. As general propositions, these statements are, of course, true; but the majority of the court recognize a vested right in the maintenance of a former decision if the highest federal court, itself determining the existence and extent of the contract, holds that an attempted distinction is not legitimate or substantial.

The kernel of the decision is contained in the following language from the prevailing opinion:

"And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power of the courts of New York, to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pro-

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made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring." Maine, Ancient Law, c. 2.

nounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate."

In view of the fact that the abutting property owners relied both upon the contract clause of the federal Constitution[1] and the due process of law clause of the Fourteenth Amendment, it is regrettable that the opinion of the court is not clearer and more specific. The discussion in the dissenting opinion is principally directed to the operation of the contract clause, a reference, however, also being made to the Fourteenth Amendment. The present decision may be rested upon the contract clause alone, because what the Supreme Court determines to be the contract right was impaired by action pursuant to a state statute. The following dictum of Chief Justice Taney in Ohio Life & Trust Co. *v.* Debolt[2] was quoted with approval in the opinion of the court in Gelpcke *v.* Dubuque:

"The sound and true rule is, that if the contract when made was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts* altering the construction of the law."[3]

This, however, does not represent the law as it has been established by later cases. In Weber *v.* Rogan,[4] and authorities therein cited, it is laid down that, in order for the contract clause to apply, the alleged impairment of contract must be by a state statute and not merely by judicial decisions or acts of the state tribunals or officers. The necessary scope of the decision in the Muhlker case is therefore somewhat limited.

Nevertheless, the general attitude of the court is significant of the position that probably would be taken if a case should arise in which a state court, not in effectuating a statute but upon a purely common law basis, should incontinently overrule itself with the result that parties who in their business dealings had relied upon the earlier decision suffered substantial loss. If a state court upon some question involving title to real estate should thus be guilty of palpable tergiversation, the inference is fair that a person aggrieved

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[1] Art. 1, § 10.
[2] 16 How. (U. S.) 432.
[3] The italics are ours.
[4] 188 U. S. 10.

might be granted a remedy on appeal to the Supreme Court of the United States under the Fourteenth Amendment. Presumptive authority for this position is furnished by Chicago, B. & Q. R. R. Co. *v.* Chicago,[1] wherein Mr. Justice Harlan elaborately examines the question whether the requirement of due process of law is confined to the providing of notice of, and opportunity for, hearing before a person's property is taken. The court cites, apparently with approval, the very sweeping language on the subject of Mr. Justice Jackson, while a Circuit Court judge, in Scott *v.* Toledo,[2] and holds that the guarantee of due process of law requires compensation to be made or secured to the owner of private property taken for public use, and further that the prohibitions of the Fourteenth Amendment comprehend all the instrumentalities of the state, — its legislative, executive, and judicial authorities. The dissenting opinion of Mr. Justice Brewer does not contravene, but strongly upholds, these abstract positions of the majority.

In Scott *v.* McNeal[3] it was directly held that the prohibitions of the Fourteenth Amendment extend to judicial acts, and, accordingly, that the judgment of the highest court of a state validating the title of a purchaser of land sold under an order of a probate court, belonging to a living person who had not been notified of the proceedings, deprived the latter of his property without due process of law.

The Gelpcke and Muhlker cases are sufficient authority for the general proposition that a judicial decision relied upon by an investor is such a contractual element as would constitute a property right. If it violate the guarantee of due process of law to take private property for a public use without compensation, *a fortiori* it would do so to take it for private use or enrichment. Indeed, there is no valid process of law by which private property may compulsorily be acquired for private use.[4]

On the whole, there appears to be adequate theoretical justification for upholding the obligation of *stare decisis* under the federal Constitution in almost any case where a citizen has reposed trust in a court's formulation of the law and pecuniary loss would result from judicial instability. Let us assume that a state court of last resort had decided that a certain strip of land is privately owned

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[1] 166 U. S. 226. [2] 36 Fed. 385. [3] 154 U. S. 34.

[4] See Davidson *v.* New Orleans, 96 U. S. 97–102; Missouri Pac. Ry. Co. *v.* Nebraska, 164 U. S. 403; Chicago, etc., R. R. Co. *v.* Chicago, 166 U. S. 226–236.

and that a person then purchased the same, or a portion of it, being either the part which the adjudication actually concerned or another part in precisely similar category on the facts. Assume, also, that in a suit thereafter brought by or against such purchaser the same court should retract its former utterance and hold that the land had before the commencement of the first action been finally dedicated and legally accepted, so that it had not been the subject of private ownership.

Let us fancy a row of identical buildings, erected by a common owner of the lots and by him conveyed, by deeds identical in form, to different persons. Let us further suppose that the highest court of the state had held that there was appurtenant to one of these houses a certain beneficial easement in the premises next door; that, subsequent to such decision and relying upon it, a person purchased another of the buildings and in legal proceedings by him to effectuate or protect his precisely similar easement the court of last resort overruled its former decision and held that no servitude existed.

A federal question would not arise in either of these moot cases under the contract clause, because contractual rights had not been impaired by a state statute. The way would, however, seem open for the Supreme Court of the United States to reverse the later decision of the state court on the ground that through its operation private property had been taken or extinguished without compensation, and therefore without due process of law.

There is a paradoxical, semi-humorous suggestion in the circumstance that in the Gelpcke and Muhlker cases the Supreme Court of the United States, in order to relieve against disregard of the obligation of *stare decisis*, itself, if not overruling specific decisions, at least went counter to what eminent dissenting judges regarded as legal first principles. The opinion of the majority of the court in the Gelpcke case is little more than an elaboration of the adage that the law was made for the people and not the people for the law. The same consideration of safeguarding rights that the ordinary citizen ought to be permitted to regard as vested rights, is the dominant note in the prevailing opinion in the Muhlker case.

The real key to these decisions lies in the fact Mr. Bryce lucidly expounds, taking Munn *v.* Illinois,[1] as his principal illustration, that "the Supreme Court feels the touch of public opinion."[2] In his

[1] 94 U. S. 113.

[2] 1 Bryce, American Commonwealth, 267.

work, "The Government of England,"[1] Mr. A. Lawrence Lowell states that the reason why the spoils system never obtained foothold in England was the prevalence of the "sentiment that a man has a vested interest in the office he holds." While this absurdly exaggerated conception never has been entertained here, American public opinion does demand, along with police protection of the peace, civil protection of vested rights asserted under private contract. The masses of the people are firmly persuaded that bad laws that are certain are better than good laws that are changeable. Continuity and consistency of judicial exposition are indispensable for faith to embark in enterprises extending into the future. Such decisions as that by the Supreme Court of Iowa disregarded in the Gelpcke case and that by the New York Court of Appeals in the Muhlker case would introduce an element of South American insecurity into commercial life. General relaxation of the obligation of *stare decisis* would foster commercial anarchy.

Expressions quite frequently occur in opinions of American courts that indicate a proper sense of responsibility as lawgivers transcending in importance the immediate duty of arbitrators. It is not at all uncommon for a court expressly to say that it will not overrule a decision that has supplied a rule of property, though another doctrine is deemed abstractly better. The most serious menace to the reliability of the law has arisen, not through frank and avowed changes of mind, but through casuistical evasion of precedent, through resort to distinctions that do not distinguish. This tendency to preserve an appearance of consistency while laying down an inherently discordant principle has been on the increase in most of the state courts. No better example of it could be furnished than the decision in the Muhlker case by the New York Court of Appeals. The reversal of that decision by the Supreme Court of the United States has rendered an important service in promoting business confidence and justice. By the recognition of the right to appeal to the Supreme Court of the United States the moral obligation of *stare decisis*, which state judges always admit, practically becomes a legal obligation.

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[1] Vol. I. p. 154.